

# Memorandum

**To:** CAFL Subcommittee  
**cc:** Patricia Wynn  
**Fr:** CAFL Staff  
**Re:** 2003 CPCS Manual Revisions – *Redlined to Reflect Changes from 1999 CAFL Trial Performance Standards*  
**Date:** October 10, 2003

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In this redlined draft, the 1999 standards are set forth in standard type, deleted language is shown in “strike-through” format, and the 2003 revisions are set forth in italics.

## PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES<sup>1</sup>

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<sup>1</sup> These Performance Standards apply to the representation of children and parents in care and protection proceedings, proceedings under G.L. c. 119, § 23C and proceedings to dispense with consent, as well as divorce, custody, guardianship and other proceedings in which a right to counsel exists. These standards do not apply to the representation of children in Children in Need of Services (CHINS) proceedings, pursuant to G.L. c. 119, § 39G.

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1. **GENERAL PRINCIPLES OF REPRESENTATION**

1.1 **Role of Counsel.**

(a) The role of counsel in these cases is to be an advocate for the client within the scope of counsel's appointment. Counsel shall diligently and zealously protect and advance the client's interests, rights and goals in the proceedings. This involves explaining the nature of all legal and administrative proceedings to the extent possible given the client's age and ability, determining the client's position and goals, and vigorously advocating such position and goals. The role of counsel is also to ensure that the client is afforded due process and other rights and that the client's interests are protected.

(b) The role of counsel also is to be an advisor and counselor. This involves

**explaining the likelihood of achieving the client’s goals and, where appropriate, identifying alternatives for the client’s consideration. In addition, counsel should explain the risks, if any, inherent in the client’s position.**

**(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation to the client.**

**(d) Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy and competent representation to the child as is due an adult client, consistent with the Massachusetts Rules of Professional Conduct.**

Commentary: The child’s counsel should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. Regardless of any alignment of position among the child and other parties, child’s counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceedings. Although the child’s position may overlap with the position of one or both parents, third-party caretakers or the Department of Social Services (“DSS”), child’s counsel should be prepared to present his or her client’s position independently and to participate fully in any proceedings.

When consistent with the client’s interest, counsel should take every appropriate step to expedite the proceedings.

## **1.2 Appointment of Counsel.**

**(a) Immediately upon acceptance of an appointment to represent a party, counsel shall, where required, file a notice of appearance with copies to all counsel and, where necessary or strategically important, an objection to the petition on the client’s behalf. ~~As soon as practicable, counsel shall obtain copies of all pleadings filed and the DSS file.~~**

**(b) Counsel shall decline the assignment if (i) counsel is unable to afford the client prompt, diligent representation, (ii) acceptance of the assignment will create a conflict or potential conflict of interest, or (iii) counsel believes that he or she will not be able to comply with these Performance Standards. If counsel declines an assignment, counsel shall give proper notice to the court.**

Commentary: Counsel cannot provide prompt, diligent representation of a client if (a) counsel is unable to begin working on the case promptly or (b) counsel is unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client’s interests. It is counsel’s responsibility to be aware of the caseload limits of the Committee for Public Counsel Services (“CPCS”) found in the CPCS Manual for Assigned Counsel (1999 2003). Counsel should not accept any assignment which will cause him or

her to exceed these limits.

### 1.3 Scope of Representation.

(a) **Duration.** ~~In care and protection cases and in actions under G.L. c. 119, §23C, all counsel shall continue to represent the client until dismissal of the petition, or termination of the petition upon the subject child attaining majority, a determination that the client lacks standing or is dismissed from the petition. In actions to dispense with consent either under c. 119 or c. 210, counsel for the child shall continue to represent the child until dismissal of the case, removal of the child from the petition, adoption or guardianship finalization, or upon the child attaining majority. If there is no appeal, or if the trial court judgment is affirmed after appeal, the obligations of parent's counsel to represent the client in actions to dispense with consent shall cease upon dismissal of the case or entry of the decree, provided that there are no post-trial matters pending for which the client has a right to counsel. A case at the trial level begins upon appointment. If counsel represents a parent or a child, a case concludes upon the earliest of the following:~~

1. *The child is adopted;*
2. *The child attains majority;*
3. *The only subject child, or the client, has died;*
4. *Counsel has withdrawn for all purposes (not for purposes of obtaining appellate counsel);*
5. *The court has struck counsel's appearance, or the appearance of the client, and no appeal has been filed regarding such action;*
6. *The case is dismissed, and no appeal has been filed;*
7. *The child is the subject of an allowed guardianship petition (as opposed to the appointment of a temporary guardian), and no appeal has been filed; and*
8. *The entry of any other order by the court not already specified above that is intended by the court as a final disposition of the matter.*

*In addition, if counsel represents a parent, a case concludes upon the earliest of the following:*

9. *A petition to dispense with the parent client's rights has been allowed, and no appeal has been filed; and*
10. *Upon conclusion of an appeal of an order under 5 through 9 above.*

*Commentary:* Courts on occasion enter orders that, although not authorized under G.L. c. 119, § 26, are intended as a final disposition of the matter. Examples include the granting of "permanent" custody to a third party other than DSS under § 26, or the allowance of a guardianship petition and the "off-listing" of the C&P. Regardless of the legality of such

*orders, CPCS treats these as events that trigger the termination of the right to counsel. With respect to Standard (a)8 above, counsel should be aware that G.L. c. 119, § 26 does not currently permit a disposition of permanent custody to a third party, although such orders are commonly entered.*

*Counsel should also be aware that a case is not considered concluded because there has been no recent court activity on the case.*

*Counsel withdrawing from a case should follow the rules set forth in Standard 8.3.*

**(b) Appointment of Appellate Counsel.** The appointment of appellate counsel on behalf of a client shall not terminate trial counsel's ongoing responsibilities to the client in proceedings before the trial court.

**(c) Collateral Representation.** Clients occasionally require legal assistance in proceedings before the Probate and Family Court, District Court or Juvenile Court on matters other than, but integrally related to, that for which counsel was appointed. Such proceedings, which may arise prior or subsequent to the commencement of the proceeding for which counsel was appointed, include, but are not limited to, divorce, custody, guardianship and paternity proceedings. Counsel appointed to represent a client in one proceeding may, with CAFL written permission, ~~represent~~ *bill CPCS for representation of* a client in these types of collateral proceedings ~~which~~ that (a) directly affect the resolution of an open proceeding for which counsel was appointed, and (b) concern the custody of child(ren) that is the subject(s) of the proceeding for which counsel was appointed. Counsel may, without notice to CAFL, represent a client at a Fair Hearing of the Department of Social Services which (a) directly affects the resolution of an open proceeding for which counsel was appointed, and (b) concerns the child(ren) that is the subject(s) of the proceeding for which counsel was appointed. *CPCS reserves the right to deny payment for work done on collateral matters where permission was not requested or was refused.*

**Authorization for any collateral representation set forth herein ends at the earlier of (a) final judgment in the collateral matter, or (b) the occurrence of any event set forth in paragraph (a) "Duration" above. In no event will authorization be given for collateral representation in any matter which requires CPCS certification not held by counsel.**

Commentary: In care and protection and §23C proceedings, both children and parents are entitled to continued representation in post-trial matters, including foster care reviews, ~~substitute care reviews~~, permanency hearings and review and redetermination proceedings. In actions to dispense with consent, the child is entitled to continued representation so long as he or she remains in the custody of DSS. Upon adoption or guardianship finalization, counsel's representation ends. There is no right to counsel in proceedings which are solely disputes between private parties, such as disagreements between birth parents and adoptive

parents or guardians over post-adoption or post-guardianship visitation.

In the appropriate circumstance and upon a written request, CPCS will re-open a Notice of Assignment of Counsel (“NAC”) to permit counsel to bill CPCS for representation of a client after the NAC has been closed. For example, counsel ~~for a parent~~ may file a motion seeking relief from judgment where sufficient grounds exist. *Forms for requesting re-opening of a NAC are available on the CPCS CAFL website.*

#### **1.4 Conflicts of Interest.**

**Counsel must be alert to and avoid all potential and actual conflicts of interest that would impair the ability to represent a client. Particularly when appointed to represent multiple clients, counsel must be alert to the potential for conflicts of interest. The presence of a conflict may require counsel to withdraw from representing one, some or all of the clients. In such event, counsel shall request that the court appoint new counsel.**

Commentary: Conflicts ~~often~~ arise when an attorney is appointed to represent multiple siblings who have different positions (e.g., one child supports the petition and another child opposes the petition). *Even though a court may find a parent fit as to one child but not another, counsel cannot, consistent with the ethical rules, simultaneously advocate a parent’s fitness as to one child and unfitness as to another.*

A conflict also may arise where an attorney is appointed to represent more than one parent. In situations where there are allegations of domestic violence, *counsel should not* ~~it may not be appropriate to~~ represent both parents. Even in a case where multiple clients share the same position, a conflict may arise if counsel receives a confidence from one client that the client wishes not be disclosed, but disclosure would advance the interests of the other client. See Mass. R. Prof. C. 1.7, Comment 12C.

Counsel must be alert to the potential for conflict not only at the time of appointment but throughout the representation. A client’s position may change as time passes, resulting in a conflict where none existed previously.

The Rules of Professional Conduct permit a lawyer to represent multiple clients, notwithstanding a conflict, if the lawyer reasonably believes to do so would not adversely affect the representation and if each client consents. See Mass. R. Prof. C. 1.7 and Comments. Rarely, if ever, would a situation arise where all the children are competent to consent and, therefore, as a general rule, counsel should always seek to withdraw from representing one or more child clients if a conflict exists among them. Counsel should be mindful of the conflict in continuing to represent any of the multiple clients when counsel holds confidences from some or all of the clients.

Counsel should also be cautious of the potential for conflict of interest in cases where the

interests of the client are closely aligned with another, unrepresented person, (e.g., between a preadoptive parent or relative caretaker). Counsel should never agree to represent such other person. Child's counsel should also be aware of the conflict inherent in accepting any role other than counsel; for example, counsel should not act as a parent proxy in signing an Individualized Education Plan.

*In accepting assignments, former DSS attorneys should be mindful of the rules regarding conflicts of interest and successive government and private employment. See Mass. R. Prof. C. 1.7-1.11. Lawyers who practice separately in an office-sharing arrangement should similarly be mindful of the conflict of interest rules and other rules set forth in Commonwealth v. Allison, 434 Mass. 670 (2001), and other appellate cases.*

### **1.5 Communications with Client.**

**In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests and needs and of the client's position in the action.**

**(a) Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate his or her client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to the first court hearing to permit counsel to prepare for such hearing. As soon as practicable, and to the extent possible given the client's age and abilities, counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers and other relevant individuals. Counsel shall also determine the client's interests, goals and position in the proceeding.**

**(b) *At a minimum, counsel shall meet with a child client on a quarterly basis, except under extraordinary circumstances.* Irrespective of a child client's age, counsel shall ~~visit~~ meet with the child client at his or her placement promptly upon receiving notice of the assignment. Counsel shall ~~visit~~ meet with the child thereafter as necessary to provide competent representation to the client, to be informed of the child's wishes and circumstances, to inform and advise the client about the proceedings, as appropriate, and to maintain an ongoing attorney-client relationship with the child.**

*Commentary: Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with a parent client. Meeting with the child regularly allows counsel to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs and wishes change over time. Counsel cannot be fully informed of such changes without developing a relationship through frequent contacts.*

*Accordingly, counsel must meet with child clients at least quarterly. The extraordinary circumstances under which counsel may meet with a child client less than quarterly include situations where the child is “on the run” and his or her whereabouts are unknown, there is strong evidence that the child will be adversely affected by meeting with counsel, the child refuses to meet with counsel, or the child is placed at a distance that makes quarterly meetings impracticable. Counsel should meet with a child client immediately after becoming informed of a change in the child’s placement. Counsel should be wary of communicating with child clients through letters or e-mail. Children may not receive such communications, or may not be the only ones to read such communications. This places the attorney’s work product and attorney-client privilege at risk.*

[We have moved this paragraph] In order to provide competent representation, child’s counsel should meet with the child in the child’s environment to understand the child’s personal context. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. Mass. R. Prof. C. 1.14 recognizes the value of the child client’s input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other *children or adults*.

**(c) Counsel shall remain in communication with the client during the course of the case to discuss, to the extent possible given the client’s age and abilities, the progress of the case, trial strategy and preparation, negotiation and settlement strategies, and post-trial goals. Counsel shall inform the parent client of all court hearings and administrative proceedings and inform such client of his or her right and/or obligation to attend such hearings. Where appropriate given the child’s age and abilities, counsel should inform the child client of court hearings and administrative proceedings. If the child *client* expresses a desire to attend a hearing, and such attendance is appropriate given the child’s age and abilities and the nature of the proceedings, counsel ~~should~~ *shall* take steps to assure the child’s attendance. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the court to issue a writ of habeas corpus to assure the client’s presence at the hearing, and shall, if necessary, *ensure service of* ~~serve~~ the writ.**

**(d) Counsel shall explain the result of all court hearings and administrative proceedings to the client. If a final judgment is adverse to the client, counsel shall explain the client’s right to appeal the decision, the appellate process, including the time limits in which a notice of appeal must be filed, and any alternative post-judgment strategy that may be appropriate. Counsel shall also explain the process and availability of post-trial reviews, if applicable. If a final judgment is not adverse to the client, counsel shall ensure that opponents adhere to time limits and discharge other**



**appellate responsibilities until appellate counsel is assigned files an appearance. In communicating the results of court hearings and administrative proceedings to a child client, counsel shall provide such information as is appropriate given the child's age, abilities and wish to be so informed.**

Commentary: Where counsel is unable to communicate effectively with the client because of either mental disability or language barriers, counsel should take whatever steps are necessary to ensure that he or she is able to communicate with the client and that the client understands the proceedings. Such steps may include obtaining expert assistance or an interpreter.

*[We have moved this paragraph]* The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications. With a child the potential for misunderstanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore, child's counsel must learn how to ask developmentally appropriate questions and how to interpret the child's responses. The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

Counsel should contact clients regularly, and should respond promptly to telephone calls, letters and other inquiries from the client.

#### **1.6 Determining and Advocating the Child Client's Position.**

**(a) Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance.**

Commentary: Counsel has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determining his or her position. Counsel must be adept at asking developmentally appropriate questions and interpreting the child's responses in such a manner as to obtain a clear understanding of the child's preferences.

In eliciting the child's preferences, counsel should be aware of and understand the factors that influence the child's decision-making process. In addition to communicating with the child client as discussed in Standard 1.5 above, counsel should review records and consult with appropriate professionals and others with knowledge of the child. Counsel also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's

perspective, priorities and individual needs, and will assist counsel in identifying relevant questions to pose to the child.

Counsel should advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the court or other parties accepting particular positions. Counsel may inform the child of an expert's recommendations germane to the issue. Counsel should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the child's expressed preferences reflect his or her actual position.

**(b) If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.**

Commentary: Rule 1.2 of the Massachusetts Rules of Professional Conduct requires counsel to "seek the lawful objectives of his or her client." Only if the lawyer determines that the client is incapable of making adequately considered decisions in connection with the representation, may counsel deviate from this requirement, and even then counsel must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Mass. R. Prof. C. 1.14, Client Under a Disability.

A child's ability to determine his or her own position may depend upon the particular matter to be determined or the circumstances involved at the time. Thus, a child may be able to make some decisions and not others. For example, counsel may reasonably determine that the child is capable of deciding that he or she would like to have visits with a sibling, but is not capable of deciding whether he or she should return home or remain with relatives on a permanent basis. Additionally, as time passes and the child matures, he or she may become more capable of directing the representation.

In determining whether a child is able to make an adequately considered decision, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. Counsel may consider the following factors: the child's ability to communicate a preference, whether the child can articulate reasons for the preference, the decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and whether the child appears to understand the consequences of the decision. See Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64 Fordham Law Review 1339 (1996). In assessing the child's ability to make adequately considered decisions, it is the quality of the child's decision-making, not the wisdom of the child's decision, that is determinative. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child's expressed preferences regarding that matter, even if the attorney believes the child's position to be unwise or not in the child's best interest. Requesting the appointment of a guardian ad litem in such cases is contrary to the Rules of Professional Conduct. Of course, the lawyer does have a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

**(c) If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation.**

Commentary: If a child is incapable of verbalizing a preference, counsel may make a substituted judgment determination, i.e., determine what the child would decide if he or she were capable of making an adequately reasoned decision, and represent the child in accordance with that determination. Alternatively, counsel may ask for the appointment of a guardian ad litem to make a substituted judgment determination and to provide direction to counsel concerning the representation. If a guardian ad litem is appointed, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

In making a substituted judgment determination, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including where necessary, the advice of an expert.

Counsel should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, counsel should determine if the child wishes the attorney to take no position in the proceeding, or if the child wishes the attorney or someone else to make the decision for him or her. In either case, the attorney is bound to follow the client's direction.

**(d) If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b) above, that the child is not able to make an adequately considered decision regarding the matter and if representing the child's expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child's expressed preferences.**

**If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child's expressed preferences would place the child at risk of substantial harm, counsel may choose one of the following options:**

- (i) represent the child’s expressed preferences regarding the matter;**
- (ii) represent the child’s expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child;**
- (iii) inform the court of the child’s expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or**
- (iv) inform the court of the child’s expressed preferences and determine what the child’s preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination.**

Commentary: The most difficult aspect of representing child clients in these cases is determining what position to take when a child can verbalize a preference but counsel believes that the client is not capable of weighing the various options or understanding the consequences of pursuing particular positions.

The Rules of Professional Conduct provide some limited guidance. Rule 1.14(a) provides that where a client is unable to make “adequately considered decisions,” the attorney must “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Further, the commentary to the Rule recognizes that there exist “intermediate degrees of competence” and that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” Thus, at a minimum, counsel’s obligation includes informing the court of the child’s expressed preferences.

If the incompetent child’s expressed preferences will not subject the child to a risk of substantial harm, counsel is obligated to pursue the child’s wishes. Mass. R. Prof. C. 1.14(b) provides that only when the client is incompetent and the attorney believes the client is at risk of substantial harm, may counsel take certain steps to protect the client.

If counsel believes the position chosen by the incompetent child is wholly inappropriate or could result in serious injury to the child, the ethical issues are far more difficult. Of course, the lawyer has a counseling function and should advise the client of the potential consequences of his or her position. However, the child’s attorney should recognize that the child may be more susceptible to the lawyer’s influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

If the child cannot be persuaded to change his or her position, paragraph (b) of Mass. R. Prof. C. 1.14 states that when the client is incompetent and the attorney believes the client is

at risk of substantial harm, the attorney may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary, requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, “the lawyer often must act as de facto guardian.”

Thus, if counsel believes that advocating the incompetent child’s expressed preferences will place him or her at risk of substantial harm, counsel may advocate the child’s expressed preferences and request the appointment of a guardian ad litem to make an independent recommendation to the court with respect to the child’s best interests. Alternatively, counsel may use a “substituted judgment” standard (i.e., what the child would decide if he or she were competent to do so) to arrive at the child’s position, either by making the substituted judgment determination himself or herself, or by asking for the appointment of a guardian ad litem to make that determination and direct counsel accordingly. A substituted judgment determination is not the same as determining the child’s best interests. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child’s verbal expressions are an important factor to consider in making a substituted judgment determination.

If the substituted judgment determination and the child’s expressed preferences differ, the commentary to Mass. R. Prof. C. 1.14 suggests that counsel must inform the court of both.

#### **1.7 Determining and Advocating an Adult Client’s Position.**

**Counsel shall advocate for an adult client’s stated preferences and goals in the proceeding and follow the client’s direction throughout the course of the case. Counsel should determine whether the client is “under a disability” pursuant to Rule 1.14 of the Massachusetts Rules of Professional Conduct and shall act accordingly. Nothing herein limits counsel’s ability to make strategic legal decisions in the case.**

Commentary: Counsel should be very cautious in requesting, *or responding to a request for*, appointment of a guardian ad litem/*next friend* for a parent because disclosure of the client’s disability can adversely affect the client’s interests in the proceeding. If a guardian ad litem/*next friend* is appointed for a parent client, counsel should ensure that the role of the guardian ad litem/*next friend* is clearly defined by the court.

#### **1.8 Protection of Confidentiality, Privileged Communications, and Attorney Work Product**

**Consistent with the client’s interests and goals, counsel shall seek to protect from disclosure communications and other information concerning the client that are protected by applicable laws of confidentiality and privilege, *including attorney work product*. Counsel ~~should~~ *shall* explain fully to the client the advantages and**

**disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, ~~counsel must consider whether to request the appointment of a guardian ad litem for the limited purpose of making such decisions~~, counsel must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation. Counsel may request the appointment of a guardian ad litem for the limited purpose of making decisions regarding waiver.**

Commentary: Counsel ~~should~~ *shall* take whatever steps are necessary to protect the client's privileges and right to confidentiality promptly following appointment to the case. Counsel should not wait until the time for filing pre-trial motions to address these matters. Improper disclosure of confidential or privileged information early in the proceeding may color and impact the manner in which the parties, the court investigator, and the court perceive the client, the services offered to the client, and the position taken by the parties. In addition, the underlying purpose of the laws of confidentiality and privilege, to protect *an and* individual's interest in keeping private certain information and certain relationships, is an important goal independent of the effect disclosure would have on the proceeding.

If a child is able to make an adequately considered decision with respect to waiver of a privilege or right to confidentiality, counsel shall advocate the child's position and, if necessary, oppose the appointment of a guardian ad litem to substitute his or her judgment for that of the child. If a guardian ad litem is appointed for a child client, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must consider whether to request the appointment of a guardian ad litem for the limited purpose of making a substituted judgment determination with respect to the matter. Counsel should ensure that the guardian ad litem considers only those factors that a competent client would consider. Counsel may wish to ensure that the guardian ad litem consider: (1) the child's expressed preferences, if any; (2) the nature of the communications and the effect on the child of disclosure; and (3) the extent to which disclosure advances or hinders the child's position in the proceeding. Counsel should object to the extent the guardian ad litem considers the need of other parties for the information insofar as the role of the guardian ad litem is to make a substituted judgment determination, not to weigh the relative benefits and harms to the child and other parties.

*Counsel must be prepared to respond to any attempt by another party to waive or invoke the client's privilege or right to confidentiality.*

## **1.9 Missing Parent Clients.**

**In the event a client’s whereabouts are unknown, counsel shall take a position in court and administrative proceedings consistent with the client’s last clearly articulated position or directive. In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether or not to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct.**

Commentary: The whereabouts of a client may, for any number of reasons, become unknown to counsel. If the client’s whereabouts become unknown during the course of a case, counsel should take any actions which are consistent with the last clearly articulated position or directives of the client. In the absence of such information, any action taken on behalf of the client is left to counsel’s discretion.

Except as otherwise set forth in Commentary to Standard 2.1, if counsel has never had contact with a client or counsel is unable to contact the client after diligent efforts, counsel may either (a) withdraw from the representation, or (b) take no position in the proceedings but take such actions as counsel deems necessary and appropriate to protect other rights and interests of the client, such as rights to confidentiality and the exercise of privileges. See Standard 7.3.

## **2. TEMPORARY CUSTODY (INCLUDING 72-HOUR) HEARINGS**

### **2.1 Right to Hearing.**

**Counsel shall assert and protect the client’s right to temporary custody (including 72-hour) hearings.**

Commentary: Temporary custody hearings (including the so-called “72-hour hearing”) is an event of crucial strategic importance in child welfare cases. Because of the potential for serious ramifications to the parent-child relationships and the safety of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings. This is true whether the client supports or opposes a transfer of temporary custody. If the parents consent to a temporary order of custody to DSS, and if the child’s position is to be placed in the temporary custody of a relative or other individual, counsel for the child should assert the child’s right to a temporary custody hearing to present evidence in support of his or her position. See Care and Protection of Manuel, 428 Mass. 527 (1998).

*The statute governing probate court orders of temporary custody to DSS does not contain*

*all of the procedural safeguards that are mandated in the juvenile court. In probate court proceedings, counsel should assert the client's right to a temporary custody hearing consistent with due process. A client in the probate court should receive no less procedural protection than that afforded similarly situated clients in the juvenile court. See Adoption of Donald, 44 Mass. App. Ct. 857 (1998).*

**Postponement by court:** The trial court may, due to scheduling difficulties, inform counsel of the need to postpone a temporary custody or 72-hour hearing. If such a continuance is inconsistent with the client's interests or goals, counsel should object to any such postponement. If necessary, counsel should consider pursuing the client's right to a timely hearing by taking an interlocutory appeal.

**Requesting continuances:** In some instances, counsel may not receive notification of his or her assignment in time to prepare adequately to represent the client at a temporary custody hearing or to summons witnesses or documents. Should this occur, counsel should advise the client of counsel's need for additional time to prepare and, if the client consents, object to proceeding with the hearing and seek a short continuance, provided that the benefit of a continuance outweighs the prejudice of not going forward. *Counsel may also need to request a continuance or reserve the client's right to a hearing if the client is unavailable due to illness or some other reason.*

**Denial of right to hearing:** If the court denies a client his or her right to a temporary custody or 72-hour hearing, and such denial is inconsistent with the client's interests and goals, counsel should consider pursuing the client's right to a hearing by taking an interlocutory appeal.

**Presence of client:** If a parent client is not present as a consequence of failure of notice by the court ~~or the court's failure to have an incarcerated or involuntarily committed client brought to court~~ or DSS, counsel should object to proceeding without the client and seek to preserve the client's right to a 72-hour hearing. *If a client is incarcerated or involuntarily committed, counsel should file a habeas corpus petition seeking transportation of the client to court. If such a petition is impracticable or a habeas order unenforceable (as it may be in cases where the client is incarcerated outside the commonwealth or in the federal system), counsel must file a motion asking the court to accommodate the client's right to participate in the proceedings through closed circuit television, telephone, or by some other means.* If a child client wishes to attend ~~a the~~ hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel should assure the child's attendance.

**Counsel without direction from client:** If counsel is without direction from a client as to his or her goals at the hearing, *counsel should seek to protect and preserve the client's due process rights. Counsel should, depending on the circumstances, request a continuance of the hearing or take such other steps as are necessary to preserve the client's right to a temporary custody hearing.* ~~counsel should request a continuance. If a continuance is not~~



~~granted, counsel may inform the court that the counsel is without direction from the client.~~

## **2.2 Preparation for Hearing.**

**In preparation for the temporary custody (including 72-hour) hearing,**

**(a) counsel shall:**

**(i) conduct an initial interview with his or her client ~~as described in Standard 1.5~~, determine the client's position, advise the client as to the merits of the case, and develop a strategy for preparing for and conducting the hearing;**

**(ii) *discuss with the client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights; and***

**(iii) review all pleadings filed in the case, any reports of suspected abuse or neglect filed pursuant to G.L. c. 119, § 51A or 51B regarding the incident(s) which led DSS to petition the court for legal custody, and all documents to be submitted as evidence at the hearing.**

**(b) counsel ~~should~~ shall, if applicable and to the extent practicable:**

**(i) ~~if applicable and to the extent practicable~~, review other portions of the client's DSS file, any pleadings filed in other child welfare cases involving the client, and any other relevant records;**

**(ii) if consistent with the client's interests and goals, identify ~~alternatives to placement other than foster care, such as relatives or family friends~~ *relatives, family friends, or other persons who are potential placement or custody options*, and take such steps as may be necessary to offer such persons to DSS and/or to the court for placement or custody determinations; and**

**(iii) if consistent with the client's interests and goals, identify and interview potential witnesses, prepare such witnesses for the hearing, and subpoena documents and/or witnesses to appear at court for the hearing.**

*Commentary: Depending on the client's interests, it may be appropriate to seek a grant of temporary custody by the court to the relative, family friend, or other person identified by the client. This is to be distinguished from a grant of custody to DSS, who can then place the child in foster care with that person. Counsel should advise the client and the placement/custody option on the differences and relative advantages and disadvantages of temporary custody versus foster care, including but not limited to issues such as the authority to make decisions regarding the child's care, eligibility for grantee-relative*

*benefits through the Department of Transitional Assistance and/or foster care payments, eligibility for services offered by DSS, and visitation.*

*The alternative remedies of a return of custody to the parent and a grant of custody to a relative, family friend, or other identified custody option are not mutually exclusive at the 72-hour hearing. Counsel need not choose between these options, and, if consistent with the client's interests and goals, must be prepared to pursue said alternative remedies at the 72-hour hearing.*

### **2.3 Conduct of Hearing.**

**To the extent consistent with the client's interests and goals as determined pursuant to these Performance Standards, counsel shall, at the temporary custody (including 72-hour) hearing:**

**(a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding (i) placement or custody of children, (ii) visitation, (iii) the assertion of privileges and confidential relationships, and (iv) the admission, exclusion or limitation of evidence;**

**(b) present and cross examine witnesses, and provide evidence in support of the client's position;**

**(c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and**

**(d) take any and all other necessary and appropriate actions to advocate for the client's interests and goals.**

*Commentary: Counsel must also remain cognizant of the provisions of G.L. c. 119, §§ 24 and 29C obligating the DSS to make reasonable efforts, prior to removing a child from the home, to eliminate the need for said removal. If appropriate, counsel should ask the court to certify that DSS failed to make reasonable efforts to prevent removal. Counsel should be aware that such a certification at this stage of the proceeding may bar a child from receiving certain services or subsidies if placed out of state.*

### **3. INVESTIGATION AND DISCOVERY**

**To develop and support the client's position, counsel shall conduct a thorough and continuing investigation at every stage of the proceeding which is independent of that of any other party to the proceeding and of any court investigator or guardian ad litem appointed by the court.**

*Commentary: Thorough, thoughtful and independent investigation ~~will assist~~ is necessary*

~~for counsel in developing to develop~~ the client's position and a theory of the case, ~~and in advising~~ advise the client and identifying potential evidence, whether beneficial or detrimental to the client's position.

### **3.1 Informal Discovery**

**(a) Meet with Client. Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client's position.**

Commentary: The client is an important and primary source of information regarding the facts of the case, the family and its history. The client may also assist counsel by identifying sources of information and records which may be relevant to the proceeding. Even with very young children, counsel can obtain valuable information from meeting with the child and viewing the child in his or her environment. (See Standard 1.5, Communications with Client) Counsel should maintain an adequate, contemporaneous record of such client interviews.

**(b) Review of Social Service DSS Records. ~~Counsel shall obtain the entire social service record pursuant to DSS regulation or applicable court rule and review its contents. Such review shall be ongoing in nature.~~ DSS records are an integral part of the preparation of a case. Counsel shall obtain the entire social services file. These records may be obtained through a formal or informal process.**

Commentary: Counsel may be able to obtain the records informally by a written request to the DSS office. However, counsel should also be aware of the Juvenile Court rules and the Code of Massachusetts Regulations regarding discovery. For Probate and Family Court actions, counsel may need to file appropriate requests for production of documents.

*While the Juvenile Court Rules do not define what is meant by the "entire" social services file, a review of the DSS Policies and Procedures Manual provides guidance as to the potential documents which will be generated or obtained by DSS when servicing a family. The records received from DSS may not contain the home finder records or any other records on the foster or pre-adoptive home. Counsel may need to file a motion to obtain those records.*

**(c) Review of Court Records. Counsel shall review court records for the proceeding in which she or he is appointed on an on-going basis. Such review shall include any court investigator, guardian ad litem, family service or probation officer reports.**

**(d) Other records. Counsel ~~should~~ shall review relevant social service, medical, psychiatric, psychological, substance abuse, law enforcement, CORI and school records, as well as records of other court proceedings, as appropriate, and take the necessary steps to obtain such records.**

~~Commentary: Counsel may need to obtain authorization for or consent to the release of confidential information in order to access information. In some instances, counsel may need to seek the court's appointment of a guardian ad litem for a client under disability or a court order for access to information.~~

(e) **Interviews.** Counsel shall contact and interview, where appropriate, those individuals with information concerning the family, such as parents, relatives, caretakers, neighbors, *DSS social workers and other social service personnel*, school personnel, day care providers, medical providers, treatment providers, former counsel, probation officers, family service officers as well as those individuals who are suggested by the client or identified through investigation or discovery as potential witnesses.

*Commentary: Counsel should be mindful of Rule 4.2 of the Massachusetts Rules of Professional Conduct, which prohibits an attorney from communicating about the subject of the representation with a person known to be represented by another attorney in the matter unless the other attorney consents. When the represented "person" is an organization such as DSS, Rule 4.2 only prohibits ex parte contact with those employees: (1) who exercise managerial responsibility in the matter; (2) who are alleged to have committed the wrongful acts at issue in the litigation; or (3) who have authority on behalf of the organization to make decisions about the course of the litigation. Neither the Rule nor case law speaks to whether, or the circumstances under which, counsel may contact DSS social workers or other DSS employees without the consent of DSS counsel. Counsel should consult Rule 4.2, the commentary thereto, and Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), for guidance on this issue.*

(f) **Physical or Demonstrative Evidence.** To the extent practicable, counsel shall view any relevant physical ~~or demonstrative~~ evidence.

(g) Counsel shall contact opposing counsel to ~~discuss their clients' positions~~ *gather information about the case and the positions of the other parties.*

(h) Counsel should, if appropriate, necessary and practicable, attend all service planning, treatment and placement meetings, administrative reviews and hearings and other proceedings involving the client. In addition, if counsel represents a child, counsel should, if appropriate, necessary and practicable, attend school conferences.

### 3.2 **Formal Discovery.**

Counsel shall, if necessary, conduct formal discovery (a) to develop a more formalized record for trial, (b) to obtain in a timely manner the information necessary to develop and support the client's position and/or (c) to understand an opponent's case. At a

minimum, counsel's strategy should include consideration of the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

*Counsel shall, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights through opposition to the discovery requests of other parties. This includes, but is not limited to, invoking applicable privileges and rights to confidentiality, raising objections on the basis of relevance, and seeking appropriate limitations on the discovery requested.*

Commentary: Counsel should timely file and seek court action on any motions to permit, compel, assist or oppose discovery as required by the applicable court rules or the Indigent Court Costs Act. In addition, counsel may deem it appropriate to seek sanctions for a party's failure to comply with discovery requests or orders. ~~Counsel may find it helpful to document the discovery strategy in the client's file.~~

#### **4. SEEKING CLIENT OBJECTIVES**

##### **4.1 Obtaining Services for the Client and His or Her Family.**

**Consistent with the client's interests and goals, counsel shall request that DSS provide appropriate services in a timely manner to the client and/or members of his or her family. The attorney shall seek to negotiate with DSS for the development of a service plan that meets the client's interests and needs and advances the client's goals in the litigation. In the event that DSS' proposed service plan does not meet the interests or needs of the client, counsel may, as appropriate, challenge the service plan through available administrative and judicial means. As necessary, counsel should investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client.**

Commentary: Counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language or cultural barriers and seek to overcome such barriers.

Services may include: family preservation-related prevention or reunification services; sibling and family visitation; domestic violence prevention, intervention and treatment; medical care; mental health services; substance abuse treatment; parent and home health aides; parenting education; respite services; independent living services; specialized or long-term foster care; adoption services; education; recreational or social services; housing; financial assistance; vocational or employment-related services.

Counsel may advocate that services be provided to the client, to another family member, or to the child's substitute caretaker. For example, where the child supports reunification, child's counsel may advocate that the parent receive particular services necessary to enable the parent to care properly for the child. Alternatively, parents' counsel may advocate for the child to receive particular services necessary to permit the child to return home.

*Counsel should be aware that the DSS regulations require that, to the greatest extent possible, the service plan be developed jointly with the family. It is important that counsel actively participate in service planning for the client.*

Where counsel represents a child for whom the permanent plan is guardianship or adoption, counsel should seek to ensure, prior to the adoption or guardianship finalization, that the child and permanent caretakers will receive all necessary and appropriate post-guardianship or post-adoption services and subsidies for which they may be eligible.

#### **4.2 Visitation.**

*At each stage of the proceeding, counsel shall assert the client's rights to, or interests in, parent-child, sibling or other visitation.*

#### **4.3 Custody and Placement.**

*At each stage of the proceeding, counsel shall zealously advocate for placement or custodial options consistent with the client's goals and objectives, and should be prepared to present placement alternatives with family members or friends.*

#### **4.4 Communicating with the Court Investigator/Guardian ad Litem.**

(a) Counsel shall contact the court investigator/guardian ad litem as soon as practicable to inform him or her of the attorney's role and of the client's position.

(b) Counsel shall, if appropriate, revoke all authorizations for the release of confidential information and oppose motions seeking access to such information.

(c) Counsel shall inform the client of the role of the court investigator/guardian ad litem, including the consequences of cooperating or failing to cooperate with the court investigator/guardian ad litem, *and prepare the client for the interview.*

(d) Counsel shall, ~~if appropriate,~~ be present at any interviews of the client by the court investigator/guardian ad litem, *unless there are compelling reasons why counsel's presence would be unnecessary.*

**(e) Counsel shall assist the court investigator/guardian ad litem in obtaining information that supports the client's position.**

*Commentary: Counsel's presence at the court investigator's or guardian ad litem's interview with the client not only provides support for the client but ensures that the client has the opportunity to fully answer all questions and to present information, including the names of other persons to be interviewed, that is helpful to the client's case. Counsel's presence can be invaluable in preparing future cross examination of the interviewer. It also permits counsel, where appropriate, to advise the client not to answer specific questions posed by the interviewer or not to sign releases in the form submitted.*

Many of the standards herein may apply as well to evaluations by other persons evaluating or interviewing the client, such as court appointed special advocates (CASAs), court clinicians, family service officers or probation officers.

#### **4.5 Filing Pleadings.**

**Prior to trial, counsel shall, as necessary, file petitions, motions, responses or objections to protect the client's rights and interests and to advance the client's position in the case. Relief requested may include, *inter alia*, temporary custody orders; orders concerning visitation; rulings that DSS has abused its discretion; court-ordered evaluations; funds for experts or other services necessary for representation permitted under the Indigent Court Costs Act; restraining orders; contempt for non-compliance with a court order; protective orders concerning the client's privileges and right to confidentiality; appointment of guardians ad litem; or dismissal of petitions or motions.**

~~Commentary: Counsel should consider filing motions for costs on an ex parte basis and seek impoundment where appropriate. E.g., Commonwealth v. Dotson, 402 Mass. 185, 187 (1988).~~

#### **4.6 Interlocutory Appeals**

**(a) Petition to Single Justice. Trial counsel shall, where appropriate, seek interlocutory relief from an order of the trial court by filing a petition to a single justice or through other appellate means. Counsel shall provide CAFL administrative staff with a copy of the petition and any supporting memoranda.**

*Commentary: As a general rule CPCS does not assign certified appellate counsel to represent clients in interlocutory matters before the single justice sessions of the appellate courts, and trial counsel remains responsible for such representation. Regional Coordinators and CAFL staff are available to provide advice on interlocutory matters on a case by case basis. In certain circumstances, CAFL staff may be able to assign a mentor to counsel to assist with the filing of the petition or even assign certified appellate counsel.*

(b) **Appeal of Single Justice Order.** Trial counsel shall, where appropriate, appeal an adverse order by the single justice to the full appellate court. In the event counsel elects to appeal an order of a single justice, or if the single justice reports his or her decision to the full appellate court, counsel shall promptly (i) contact CAFL for the assignment of certified appellate counsel to work on the appeal, and (ii) provide CAFL with copies of all papers filed in the appellate court that were not already provided under section (a) above.

#### 4.7 **Experts**

(a) Counsel shall retain an expert where reasonably necessary to assist counsel in preparing or presenting the case.

(b) If counsel determines that expert assistance is necessary, counsel shall file a motion under the Indigent Court Costs Act to obtain the necessary funds for hiring an expert. If the motion is denied in whole or in part, counsel shall consider filing a notice of appeal in accordance with G.L. c. 261, § 27D.

(c) Counsel shall protect the confidentiality of all expert-related information including as necessary: filing motions for costs on an ex parte basis; requesting impoundment of the motion for costs; and informing the expert about the attorney-client privilege and attorney work-product protection.

*Commentary: Otherwise discoverable documents enjoy a qualified immunity from discovery if they are attorney work product pursuant to Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Work by an expert retained by counsel is similarly protected. Counsel should take steps to safeguard the expert's work product, including filing the motion for costs ex parte and seeking impoundment of the motion. Counsel should send the expert an engagement letter that explains the expert's role in assisting counsel, and directs the expert to speak to no one about his or her work without counsel's permission. In the event counsel makes a strategic decision to share the results of the expert's work, counsel should convey such results him- or herself; counsel should not allow another attorney to speak to directly to the expert. If counsel fails to take adequate precautions, he or she may inadvertently waive the work product protection. See Adoption of Sherry, 435 Mass. 331 (2001).*

(d) Counsel shall be familiar with the foundational requirements for the admission of expert testimony.

*Commentary: Counsel may hire a "testimonial expert" to provide testimony in a hearing or trial, or a "preparatory expert" to provide assistance to counsel in preparing the case. The need for expert assistance should be considered throughout the case, for example at the temporary custody hearing, an abuse of discretion hearing, trial or permanency hearing. More than one expert may be needed in a particular case.*



*For testimonial experts, adequate preparation is essential. Adequate preparation is also essential if counsel is opposing admission of expert testimony. Counsel should be aware that expert opinion comes not just from hired experts. Fact witnesses, such as social workers, guardians ad litem, court investigators and treatment providers may also offer expert opinion. Counsel should be prepared to satisfy or challenge the foundational requirements of such opinions.*

## **5. PERMANENCY HEARINGS**

### **5.1 Right to Hearing**

***Counsel shall assert and protect the client's right to a hearing on the permanency plan for the child.***

*Commentary: The court may choose to conduct a permanency hearing in conjunction with an adjudicatory hearing on the merits of the petition. Counsel should object if this is prejudicial to the client. Counsel should zealously advocate for the client in the permanency hearing in addition to any obligation he or she may have in the adjudicatory hearing.*

*In the event that the court denies or improperly limits the client's right to a permanency hearing, counsel should consider pursuit of any available avenues for relief, including but not limited to interlocutory appeal, or appeal under G.L. c. 119, § 29B. Counsel should ensure that the appellate record is preserved by making detailed and specific offers of proof through, among other methods, affidavits or oral or written proffers.*

### **5.2 Preparation for Hearing**

***In preparation for the permanency hearing, consistent with the client's interests and goals, counsel shall:***

- (a) obtain and review the permanency plan for the child filed by the petitioner, and determine the extent to which the plan is consistent with the client's position;***
- (b) if the proposed plan is inconsistent with the client's position, file a timely objection;***
- (c) conduct any necessary discovery;***

- (d) determine what evidence to present;*
- (e) prepare for the direct and cross examinations of witnesses; and*
- (f) take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing, including but not limited to the issuance of subpoenas and the filing of motions.*

*Commentary: Counsel should be familiar with Trial Court Rule VI, Uniform Rules for Permanency Hearings. Counsel should seek a continuance of the permanency hearing when the petitioner has not complied with Trial Court Rule VI, unless a continuance is inconsistent with the client's position.*

### **5.3 Conduct of Hearing**

***During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals, counsel shall:***

- (a) file all appropriate written objections, motions, and/or legal memoranda;*
- (b) present and cross examine witnesses;*
- (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal;*
- (d) consistent with the client's goals, advocate for a finding as to reasonable efforts; and*
- (e) prepare requested findings of fact, conclusions of law, and proposed orders.*

*Commentary: Because the issues to be litigated at a permanency hearing often overlap with those to be litigated at a trial, the court may be inclined to limit the scope of the evidence to be presented at the permanency hearing. Consistent with the client's position, counsel should object to any limitations placed on the client's ability to present evidence.*

*There may be situations in which it is strategically advantageous to not fully litigate at the permanency hearing. Counsel must consider whether it better serves the client's interests to wait until the trial or other stage of the proceeding to present and/or object to evidence.*

*Where appropriate, counsel should seek to secure specific orders at the permanency hearing, as a means for expediting permanency for the child.*

*For guidance regarding the client's participation at the permanency hearing, see Standards 1.9, 2.1 and 6.1(h) and commentary thereto, concerning the presence of the client and the client's direction to counsel.*

#### **5.4 Appeal**

***If the client wishes to appeal the permanency hearing decision, counsel shall file a timely appeal and follow the rules set forth in Standard 8.1.***

### **6. TRIAL PREPARATION AND CONDUCT**

#### **6.1 Trial Preparation**

**Counsel shall take all necessary and appropriate steps to assure full preparation fully prepare, defend and present and presentation of the client's position at trial.**

*Commentary: In order to effectively prepare and defend the client's case, counsel should have a theory of the case, i.e., a cogent statement of a position that justifies the outcome. Throughout trial preparation, counsel needs to consider the theory of the case and how each piece of evidence affects the theory.*

**(a) Pretrial motions. Counsel shall ~~determine the need to~~ prepare and file pretrial motions ~~which~~ that advance the client's interests and seek to have such motions heard expeditiously by the court.**

*Commentary: Counsel should consider the full range of pre-trial motions available to advance the client's position at trial. Such motions may include, *inter alia*, discovery motions to compel or oppose discovery; motions *in limine* to exclude evidence; motions to strike privileged communications or opinions or judgments from documentary evidence; motions for speedy trial and consecutive days of trial; *motions for visitation*; motions to bifurcate proceedings; and motions for stenographic record and for the allowance of funds pursuant to the Indigent Court Costs Act, G.L. c. 261, §§ 27A-G.*

**(b) Counsel shall determine what evidence will be submitted to the court ~~in support of the client's position.~~**

*Commentary: Counsel shall identify all lay and expert witnesses as well as all documentary, demonstrative and physical evidence that he or she will seek to introduce into evidence in the client's behalf. In addition, counsel shall be prepared, when necessary, to cross-examine all witnesses called by other parties and object to, or file appropriate limiting motions as to, documentary evidence proffered by other counsel.*

(c) **Pretrial conference.** Counsel shall notify the client of the pretrial conference date in writing and shall prepare for the pretrial conference. Counsel shall seek to discuss with other counsel and/or pro se litigants contested and uncontested facts and issues. Such preparation ~~shall~~ *may* also include the drafting and filing of a ~~pretrial memorandum of motions in limine and pretrial memoranda~~ in accordance with the pretrial orders, ~~or~~ *rules or practices* of the court.

Commentary: The purpose of the pretrial conference is to determine contested and uncontested facts, simplify issues for trial, explore settlement opportunities and to estimate accurately the necessary trial time for the court. ~~Counsel may be required to provide a list of witnesses and exhibits~~

*Counsel should request that the court establish a deadline for outstanding discovery requests and the exchange of final witness and exhibit lists prior to trial. Counsel may also consider seeking consecutive trial dates or the sequestration of witnesses. In addition, counsel should determine strategically whether to have outstanding pretrial motions heard at the time of the pretrial conference. Counsel should consider shortening the trial process by endeavor to take all steps to advance the clients position including, where possible entering into stipulations of uncontested facts or stipulations to testimony.*

*Counsel should be aware that Juvenile Court Rule 8 requires counsel to submit any motions in limine relative to the court investigator's report at the time of the pretrial conference. Failure to submit such motion in accordance with the rules may prohibit counsel from submitting it a later date thereby precluding counsel from objecting to such evidence.*

(d) **Scheduling of Trial.** *Where consistent with the client's interests, counsel shall take all steps necessary to assert the client's right to a prompt trial, which may include objecting to continuances or moving for protective orders, sequential trial dates, or for a speedy trial.*

*Commentary: There are a number of issues that can result in trial delays, such as the need for a foreign language or sign language interpreter, stenographer, or audio-visual equipment to permit an incarcerated client to participate in the proceedings. Counsel must consider these issues in his or her trial preparation.*

(e) **Counsel shall take all necessary and appropriate steps to assure the availability and submission of evidence at trial.**

Commentary: Counsel should provide written notification of the trial date to the client and all witnesses. Counsel should determine the availability and willingness of witnesses to appear and testify at trial. If witnesses are unavailable on the date that the trial is scheduled, counsel should consider the necessity of seeking a continuance of the trial if the testimony is crucial to the client's position or, in the alternative, explore other methods of introducing the testimony into evidence. If the appearance of a witness or party necessitates the issuance of

a subpoena or writ of habeas corpus, counsel should seek the issuance of such process and take steps to assure the payment of any fees associated with such process.

Counsel should take all necessary action to assure that documentary evidence is available for introduction into evidence. Counsel should consider utilizing various statutory remedies, including the issuance of subpoenas duces tecum in this regard. In conjunction with all counsel, counsel should consider preparing an exhibit book containing stipulated and contested documentary evidence for the convenience and benefit of the court.

Counsel should consider assembling a trial notebook which contains, *inter alia*, witness testimony, exhibits, pretrial orders, pleadings, evidentiary memoranda, statutory and decisional law, timeline, genogram, family history, etc. to assist counsel's organization during trial. Counsel shall, as appropriate or where requested by the court, prepare evidentiary memoranda, requests for rulings and findings of fact and rulings of law consistent with the client's position and the anticipated evidence.

**(f) Preparation of witnesses. Counsel shall prepare *his or her own witnesses* for direct and cross examination of witnesses in advance of trial.**

~~Commentary: Counsel may find it advisable to schedule an in-person meeting with witnesses to assist the witness with preparation for examination and review general rules of testimony.~~

**(g) Participation Preparation of parent client to testify: Counsel shall fully prepare the parent client to testify and shall discuss with him or her the desirability of the client testifying at trial and the adverse inferences which may be drawn by the court in the event that a parent client does not testify. Further, counsel shall advise the parent client that an opposing party may call the parent client as a witness. Counsel shall discuss with the parent client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights.**

*Commentary: The parent client's testimony can be the most helpful or damaging evidence to the client's case depending on preparation. Such preparation should include multiple meetings with the client to explain the testimonial process and to participate in mock direct and cross-examinations of the client.*

*If the parent client is incarcerated counsel must visit the client to ensure proper preparation. Counsel shall seek to ensure an incarcerated client's presence at trial by petition for habeas corpus. If the client's presence cannot be secured, counsel shall seek to preserve the client's right to participate in the proceedings by filing a motion for some other form of accommodation such as closed circuit television or telephone. See also Standard 2.1*  
*Commentary.*

(h) **Participation Preparation of child client to testify:** ~~[broken off from (g) above]~~ Counsel for a child client should accommodate the expressed wishes of a competent child client to be present during trial. In determining whether to call the child client as a witness, counsel shall consider the child's competency to testify, the need for the testimony, the harm that such testimony may cause the child and the child's expressed wishes. Counsel shall prepare the child to testify and seek appropriate accommodation for the child from the court to minimize any anticipated trauma. *Where appropriate, counsel shall oppose the efforts of other parties to call the child as a witness.*

Commentary: ~~Children may wish or need to testify.~~ Counsel should prepare the child in an age appropriate manner to testify at trial. Counsel may wish to consult persons familiar with the child or retain an expert to assist in such preparation.

*If the child does not wish to testify, but counsel determines that the child's testimony would further the child's position, counsel should* ~~Counsel should consider the need for the child to testify and should~~ explore whether there are alternative means for the court to admit any statements of the child which may be relevant to the proceeding, such as exceptions to the hearsay rule or the inclusion of such statements in any report of the court investigator and/or guardian ad litem. In addition, counsel should examine whether evidence which the child might give the court is available from other witnesses.

If the child does not wish to testify, but is subpoenaed to testify, and testifying could be harmful to the child, counsel should seek to quash the subpoena through the presentation of evidence as to said harm to the child. Alternatively, counsel should determine if the evidence can be admitted through any of the other means described in the preceding paragraph.

If the child ~~chooses to~~ must testify, counsel ~~shall~~ should seek to minimize any harm to the child by requesting special accommodations for the child's testimony, such as ~~alteration in~~ *altering* the location of the testimony, ~~having the testimony taken~~ *allowing the child to testify* informally and in a developmentally sensitive manner outside the presence of other parties to the proceeding, ~~the use of~~ *using* leading questions, or ~~a limitation on~~ *limiting* the scope of cross examination. *See Adoption of Roni, 56 Mass. App. Ct. 52 (2002).*

~~Similarly,~~ The child may wish to be present during trial. While counsel should assure that the child is brought to court, he or she should also counsel the child that the judge may nevertheless exclude the child from the courtroom in an effort to shield the child from potential trauma.

## **6.2 Trial Conduct.**

**During trial, counsel shall act as a zealous advocate for the client by ensuring that proper procedures are followed and that the client's interests are represented. To the**

extent consistent with the client's interests and goals, counsel shall:

~~(a) — file all appropriate motions and legal memoranda, including but not limited to motions regarding (i) placement or custody of children, (ii) visitation (including post-trial visitation), (iii) the assertion of privileges and confidential relationships, and (iv) the admission, exclusion or limitation of evidence to be presented;~~

~~—— (b) — present and cross examine witnesses, and provide evidence in support of the client's position;~~

~~—— (c) — make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and~~

~~—— (d) — prepare requested findings of fact and conclusions of law.~~

*(a) File all appropriate motions and legal memoranda, which may include motions regarding (i) post-termination and/or post-adoption contact, (ii) sibling visitation, (iii) the assertion of privileges and confidential relationships, (iv) the admission, exclusion or limitation of evidence to be presented, i.e., motions in limine; or (v) the sequestration of witnesses;*

**(b) Present and cross examine witnesses and provide evidence in support of the client's position;**

**(c) Make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and**

**(d) Prepare *proposed* requested findings of fact and conclusions of law.**

*Commentary: Although a client's position may be consistent with that of another party, counsel for that client remains responsible for presenting evidence and witnesses. Counsel should also make all necessary evidentiary objections, because an objection by one attorney to evidence or testimony protects only that attorney's client.*

*Proposed findings and conclusions are a crucial opportunity to marshal evidence supporting the client's position. They may also help to preserve issues for appeal. Proposed findings of fact must reference the evidentiary source(s). The Supreme Judicial Court has issued guidelines for proposed findings for these cases that are available on the CPCS website.*

## **7. SETTLEMENT**

**Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider utilizing available settlement resources, including ~~public or private~~ mediation, to narrow contested issues or reach global resolution. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.**

*Commentary: From the time of appointment, and at every stage of the proceeding, counsel should be aware of the possibility of settlement opportunity and should discuss such opportunity with the client. Counsel should, consistent with the client's interests and direction, and at strategically appropriate times, proffer and respond to settlement offers without compromising the client's position in the proceeding. Counsel should participate in the settlement process for or with the client to the extent that the client wishes or that it is advisable to protect the client's interests. Counsel must, however, continue to move the litigation forward for the benefit of the client in the event that settlement fails.*

Counsel for a child client should keep in mind that a negotiated resolution of these proceedings often serves the child's needs for finality, security and family contact, and should encourage settlement whenever such resolution is consistent with the child's interests and goals.

## **8. POST-JUDGMENT TRIAL REPRESENTATION**

**Counsel shall inform the client of the court's decision and act in accordance with Standard 1.5. Counsel shall discuss with the client his or her *post-judgment and* appellate options regarding an adverse decision from *the* court. Counsel shall continue to represent the client in accordance with Standard 1.3.**

*Commentary: A child's position may change after trial. It is critical for child's counsel to inform the child of the court's decision and determine whether the child's position requires counsel to challenge all or part of the judgment.*

### **8.1 Appeals.**

**(a) If the client elects to appeal, counsel shall file a timely appeal, ~~request a stay of the judgment,~~ order cassettes or transcripts or ensure that they have been ordered and seek assignment of CAFL appellate counsel in accordance with the Rules of Appellate Procedure. *For parent clients, counsel shall take such steps as are necessary to obtain the client's signature on the notice of appeal. If appropriate, counsel shall also request a stay of the judgment pending appeal.* Counsel for the appellee shall monitor appellant's compliance with appellate deadlines.**



(b) Counsel shall submit necessary documentation to CAFL for the assignment of appellate counsel immediately upon the filing of the appeal, even if counsel is appellate certified. If counsel *is appellate certified and* wishes to keep a case on appeal, counsel must seek the permission of CAFL administrative staff.

(c) Counsel shall represent the client on all appellate matters until appellate counsel files an appearance.

(d) Counsel shall cooperate with the client's appellate counsel and provide appellate counsel with copies of exhibits, motions, *and other pleadings notices of hearings and reviews*. Counsel shall provide appellate counsel with other papers, including the case file and/or trial notes, upon request.

## **8.2 Post-Trial Judgment Hearings, Reviews and Motions.**

~~Counsel shall continue to represent the client in matters before the trial court following the conclusion of the trial and~~ *Following* issuance of the judgment, counsel shall continue to represent the client ~~or decree~~ in accordance with Standards 1.3 and 1.5. Counsel shall also continue to represent the ~~child~~ client (*except for parents where parental rights have been terminated*) at all appropriate administrative and foster care reviews. *Where appellate counsel has been assigned, trial counsel shall notify appellate counsel of any activity in the trial court and any other significant event.*

Commentary: Counsel continues to represent the client in the trial court when an appeal is taken. *Counsel should not withdraw from the case just because an appeal is filed.* After the appeal has been docketed *in the Appeals Court*, trial counsel may not file *certain* pleadings in the trial court which seek to affect the judgment absent leave of the appellate court. Counsel should notify appellate counsel of the need to proceed in the trial court and request that appellate counsel seek the appropriate leave of court.

## **8.3 Cessation of Representation**

(a) **Conclusion of case.** In the event the case concludes by the occurrence of one of the events described in Standard 1.3(a) above, counsel shall notify the client and explain the meaning and ramifications of case conclusion.

(b) **Withdrawal from case of an appearance.** *In the event counsel seeks to withdraw from a case, counsel shall move the court for successor counsel for the client.* ~~withdraws his or her appearance,~~ Counsel shall provide the client with a copy of the motion to withdraw and notice of the hearing. Counsel shall, to the extent practicable, avoid disclosing confidential information and information adverse to the client in any motion to withdraw or hearing thereon. If successor counsel is named, counsel shall cooperate with successor counsel. *In the event the court determines not to appoint successor counsel, counsel should advise the court and opposing counsel of the client's*

***address, unless otherwise directed by the client.***

*Commentary: In situations where counsel is withdrawing at the client's request, counsel should advise the client that the court may decline to appoint substitute counsel unless the client can demonstrate good cause. See Adoption of Olivia, 53 Mass. App. Ct. 670, 673-675 (2001).*

*It is very important that pro se clients receive the same pleadings and notices as are served on counsel. If counsel is withdrawing from a case involving domestic violence or presenting other safety concerns for the client, counsel may not wish to disclose the client's address to other counsel or other pro se litigants. In such circumstances, counsel should, contemporaneously with the motion to withdraw and (if possible) after discussion with the client, (a) file a motion to impound the client's address and (b), unless the client provides the court with the completed appointment of agent form, ask the court to provide the client with notices of any hearings scheduled and copies of any pleadings filed or orders entered.*

**(c) Striking ~~an~~ counsel's appearance. In the event the court strikes counsel's appearance and no successor counsel is appointed, counsel should advise the court and opposing counsel of the client's address, *unless otherwise directed by the client.***

*Commentary: Counsel should follow the commentary set forth in Standard 8.3(b) above. ~~If the court strikes counsel's appearance and the client will be appearing pro se, counsel should ensure that the court, clerk's office and opposing counsel are aware of the client's continued involvement and have an address at which to serve future pleadings and notices on the client. See Mass. R. Prof. C. 1.6 and commentary thereto.~~*